72-436

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Supreme Court, U. S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1972

HORWOOD J. PATTERSON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 72-436

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. _____

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IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1972

NO._____

NORWOOD J. PATTERSON,	)
	)
Petitioner,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Norwood J. Patterson, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on July 3, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit printed in the Appendix, infra, (A. 1-5) is reported in _____F.2d_____(July 3, 1972).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit dated and entered its judgment in this case affirming petitioner's convictions by the United States District Court for the Northern District of California on July 3, 1972. Thereafter, a timely petition for rehearing and suggestion for a rehearing en banc was filed and on August 14, 1972, the Court of Appeals dated and entered its order denying the petition for rehearing and rejected the suggestion for a rehearing en banc. No extension of time has been sought or granted within which to petition for certiorari. The statutory provisions believed to confer on this Court

jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. §1254(1) and 28 U.S.C. §1651(a).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal trial of a taxpayer-employer, after he has been administratively placed in a category different from other taxpayer-employers without an opportunity for an administrative hearing to determine whether he should be in such special category, satisfies the "hearing" requisites of due process wherein the statute allowing such categorization provides for a deprivation of the taxpayer-employer's liberty in contrast to his property?

2. Whether Congress has the power to provide for imprisonment of an employer-taxpayer for non-willful conduct of failure to pay money (i.e., employee withholding taxes) on certain specified dates; or whether, by expressly removing the element of willfulness, did Congress enact an unconstitutional

statute providing for imprisonment for debt and a denial of equal protections of the laws?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Internal Revenue Code of 1954:

"Sec. 7215. OFFENSES WITH RESPECT TO COLLECTED TAXES. (26 U.S.C. §7217)

(a) Penalty.--Any person who fails to comply with any provision of Section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

(b) Exceptions.--This section shall not apply--

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of Section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages)

shall not be considered to be circumstances beyond the control of a person."

"Sec. 7512. SEPARATE ACCOUNTING FOR CERTAIN COLLECTED TAXES, ETC. (26 U.S.C. §7512)

(a) General Rule.--Whenever any person who is required to collect, account for, and pay over any tax imposed by subtitle C or chapter 33--

(1) at the time and in the manner prescribed by law or regulations (A) fails to collect, truthfully account for, or pay over such tax, or (B) fails to make deposits, payments, or returns of such tax, and

(2) is notified, by notice delivered in hand to such person, or any such failure,

then all the requirements of subsection (b) shall be complied with. In the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee, shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

(b) Requirements.--Any person who is required to collect, account for, and pay over any tax imposed by subtitle C or by chapter 33, if notice has been delivered to such person in accordance with subsection (a), shall collect the taxes imposed by subtitle C or chapter 33 which

which become collectible after delivery of such notice, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank (as defined in section 581), and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

(c) Relief From Further Compliance With Subsection (b).-- Whenever the Secretary or his delegate is satisfied, with respect to any notification made under subsection (a), that all requirements of law and regulations with respect to the taxes imposed by subtitle C or chapter 33, as the case may be, will henceforth be complied with, he may cancel such notification. Such cancellation shall take effect at such time as is specified in the notice of such cancellation."

28 U.S.C. §2007(a):

"A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to and writ of execution or process issued from a court of the United States in accordance applicable in such state."

California Constitution, Article 1, §15, provides in pertinent part:

"Imprisonment for Debt:

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of willful injury to person or property; * * *."

STATEMENT OF THE CASE

Petitioner Norwood J. Patterson was convicted by a jury in the United States District Court for the Northern District of California on nine (9) counts of violating 26 U.S.C. §7512(b); i.e., of collecting taxes from the employees of Sierra Broadcasting, Inc., and failing to deposit them in trust for the United States within two banking days of the dates those sums were collected.

In a consolidated action, Patterson was also convicted of seven (7) counts involving the collection of taxes from employees of Radio Station KBIF, Inc.

He appealed both judgments.

Patterson and his wife owned all the stock in Sierra, and Pattco, Inc., which owns KBIF. Patterson was president of both Sierra and KBIF.

After a period of delinquencies covering the years 1963 through 1968, Patterson was interviewed by agents of the Internal Revenue Service. He was warned and repeatedly urged to comply with the withholding requirements but delinquencies continued.

Without an administrative hearing, Patterson was served with IRS Forms 2481[1/] which placed him in a special category pursuant to 26 U.S.C. §7512 requiring him to collect the withholding taxes from his employees and to deposit such taxes in a trust account for the Government no later than two days after his employees' paydays. Section 7512 contains no provision for an administrative hearing prior to placing a person into this special category.

1/ This form appears in verbatim form in the appendix (A. 6-8).

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Failure to comply with Section 7512 is a misdemeanor as defined under 26 U.S.C §7215.

In enacting these sections, Congress attempted to establish a misdemeanor which did not have the requirement of "willfulness". See Senate Report No. 1182, 85th Cong., 2d Sess., 2 U.S.C. Cong. & Adm. News (1958), pp. 2187-9. 2/

Patterson either did not comply, or he did not strictly comply, with the provisions of IRS Form 2481 and was prosecuted.

His appeal was based upon the grounds that he had been denied due process of law by being placed in a trust-account category without a hearing; that the law under which

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2/ Other remedies of the Government existing at the times stated within the informations were provided for by 26 U.S.C. §6672 and 26 U.S.C. §7202. Section 6672 provides for a 100% civil penalty for "willfully failing to collect and pay over employee's withholding taxes. Section 7202 provides for a conviction for willfully failing to collect and pay over such taxes.

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he was prosecuted was unconstitutional because it, in and of itself, did not provide for an administrative hearing before he was placed in the special category; and, it provided for "imprisonment for debt" in that Congress expressly excluded "willfulness" as an element of the offense.

The Court of Appeals rejected all of Patterson's contentions and affirmed his judgments of conviction, which ordered him to pay a fine and be imprisoned for a period of ten months.

REASONS COMPELLING THE ALLOWANCE OF THE WRIT

1. 26 U.S.C. §§ 7215 AND 7512 ARE UNCONSTITUTIONAL IN SO FAR AS THEY PERMIT ADMINISTRATIVE CATEGORIZATION OF AN EMPLOYER-TAXPAYER DIFFERENT FROM OTHER EMPLOYER-TAXPAYERS AND THEREBY UNIQUELY SUBJECTING HIM TO FINE AND IMPRISONMENT WITHOUT A HEARING OR OPPORTUNITY TO BE HEARD PRIOR TO SUCH ADMINISTRATIVE DETERMINATION.

As will be demonstrated, these statutes do not satisfy the "hearing" requirements of due process of law. Because liberty, rather than property is involved, the lack of a hearing or opportunity to be heard cannot be cured by a later court trial.

In its opinion, the Court of Appeals erroneously held [_____ F.2d _____, A. 4]:

> "The constitutional arguments are answered by United States v. Plotkin, 239 F.Supp. 129 (E.D. Wis. 1965). 3/ Due process does not demand hearings during every stage of administrative proceedings which lead to a confrontation with the government. It is sufficient if a hearing is had prior to the final order which deprives the person of his liberty. Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153 (1941)" [Emphasis added.]

It is interesting to note that Judge Grubb in Plotkin reached the same determination as the Court of Appeals based upon the

holding
/of the Supreme Court in Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608 (1931):

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.* * *" [283 U.S. p. 595, 51 S.Ct. p. 611, as cited 239 F.Supp. p. 132.]

The Phillips court, however, immediately following the above citation, settled that this was a rule to be applied solely to matters involving property rights and not liberty:

> "Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal may be obtained promptly by the writ of habeas corpus [citations], the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones the redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue. * * *" [Emphasis added.]

* * * * *

"Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. * * *" [Emphasis added.]

It is clear that there are two different and distinct rules regarding "hearings" and the "opportunity to be heard" as promulgated by the Supreme Court.

First, when only property rights are involved, if a hearing is had prior to the final order which deprives the person of his property the demands of due process are met. See, in accord, Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-3; 61 S.Ct. 524, 536 (1941), cited in the opinion of the Court of Appeals [A. 4].

Second, where liberty is involved, if there is not a "hearing" or "opportunity to be heard" in order to challenge an administrative determination placing a person in a certain category (not otherwise criminal) which results in his arrest and therefore deprives him of his liberty, the demands

of due process are not satisfied. This is the basis for the writ of habeas corpus as described in Phillips, supra.

The Court of Appeals in Patterson mistakenly relies upon Opp Cotton Mills, supra, where the corporate petitioner challenged the procedures under the Fair Labor Standards Act applying to property rights of the petitioner. Therein, the petitioner claimed a lack of due process in that the Act provided for a committee hearing to recommend to the Administrator industry minimum wages after hearings without notice of hearing to the parties affected. After the recommendations were made by the Committee to the Administrator, notice of hearing and a hearing were available to the affected parties before the order became final. The petitioner claimed it was entitled to more than just the one hearing.

The Court stated in regard to administrative hearings and due process [312 U.S. 152-153; 61 S.Ct. 536]:

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"The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." [Emphasis added.]

Opp Cotton Mills, supra, does not apply to Patterson's case in that Patterson had no hearing whatever prior to the final order depriving him of his liberty (i.e., his arrest on the criminal charges). 26 U.S.C. §§ 7215 and 7512 do not provide for any hearing whatever prior to an employer being placed in a category which makes otherwise non-criminal activity a criminal act.

By no constitutional precedent can it be maintained that a judicial hearing (i.e., the criminal trial) in such a criminal case meets the demands of a required due process administrative hearing wherein his special category for criminal prosecution was determined.

The Court of Appeals hereinbelow has decided this substantial federal question in a way in conflict with applicable

decisions of this Court.

Such a fundamental departure from law established by this Court should not stand.

2. BY EXPRESSLY EXCLUDING THE ELEMENT OF WILLFULNESS IN THE LEGISLATIVE SCHEME EMBRACED BY 26 U.S.C. §§ 7215 AND 7512, CONGRESS ACTED IN EXCESS OF ITS JURISDICTION IN THAT IT CREATED A CRIMINAL OFFENSE OF IMPRISONMENT FOR DEBT, DENYING PETITIONER EQUAL PROTECTIONS OF THE LAWS.

Without citing any legal authority, The Court of Appeals in Patterson disposed of Patterson's argument by stating [_____ F.2d _____, A. 4-5]:

> "The argument that he is being imprisoned for debt is specious. Patterson's misdemeanor was using as his own the tax money he was required by law to withhold from his workmen's wages and to pay over to the government. Congress has adequate power to punish such conduct."

The informations filed in the trial court charged that petitioner was a person subject to the provisions of Section 7512(a);

that he was served with a special notice delivered in hand to comply with Section 7512(b); and, that thereafter he collected such taxes which became collectible after delivery of the notice, "but failed to deposit said taxes within two banking days after said taxes were collected in a separate bank account in trust for the United States."

Congress enacted Sections 7215 and 7512 on February 11, 1958 [Public Law 85-321, §§ 1 and 2, 72 Stat. 5 and 6].

Since its enactment fourteen years ago, only one case appears to have been reported as interpreting the statute, and that case is from a District Court. See United States v. Plotkin, 239 F.Supp. 129 (D.C. E.D. Wis. 1965), Grubb, J.

Because of the lack of reported cases on the subject, an examination of the intent and purpose of Congress is in order. See Senate Report No. 1182, 85 Cong., 2d Sess., 2 U.S.C. Cong. & Adm. News (1958), pp. 2187-2192.

The Senate Finance Committee reported that the bill would apply to approximately one fifth of 1 percent of the total of FICA and income taxes withheld from employees by historical analysis [2 U.S.C. Cong. & Adm. News (1958) p. 2188].

The Committee stated, page 2188:

> "Present law in section 6672 provides a civil penalty of 100 percent for any person who willfully fails to collect or truthfully account for and pay over an internal-revenue tax for which he is responsible. However, this civil penalty is ineffective where the employer has lost the employees' funds in a business venture or where he did not have them in the first place. The latter, which presents one of the most difficult enforcement problems, can be illustrated by a secondary contractor who is without funds, but obtains from the prime contractor just enough to meet his net payroll. The prime contractor in this case, since he is responsible for the completion of the job, is willing to provide for the net wage payments, but since he is not the 'employer' cannot be required to provide the taxes to be withheld by the 'employer'. The secondary contractor who is the 'employer', apart from the net wage payments, does not have any funds in these cases to set aside as withheld taxes."
>
> "A criminal penalty is also provided by section 7202 of present law.

This provides a penalty of up to $10,000 or imprisonment for up to 5 years, or both, for willful failure to collect, or truthfully account for or pay over the taxes. This criminal penalty also has proved to be of limited usefulness because of the difficulty of proving willfulness, which to a lesser extent has also been a problem in the case of the civil penalty."

"The courts, for example, in the criminal case generally have refused to treat as 'willful' those cases where the employer failed to pay over amounts withheld because they used the funds in business ventures which were not successful and no longer had such amounts available to be paid over to the Government."

The criminal penalty added by this bill does not require proof of 'willfulness' before it applies. Moreover, the penalty is less severe than that now imposed under existing law for 'willful' failure. As a result, it is believed that the new penalty can be applied to many of the delinquency cases where the present 'willful' failure provision has been ineffective. * * *" [Emphasis added.]

Thus,"willfulness" in that the defendant "willfully failed to make such deposits" cannot be implied in the statute as this would be contrary to the declared intent and purpose of Congress.

Congress attempted to enact a "malum prohibitum" offense, applicable to a very

limited group of taxpayers, whereby a person in this group who fails to deposit money in a trust account for the United States within two days after it is "collected", such as petitioner, must go to jail for a failure to pay over money.

Though it has been generally held that no constitutional or statutory provision prevents imprisonment for nonpayment of taxes, the federal cases in this regard refer to cases where there has been a willful non-payment or the subject taxes involve licensing. [See United States v. Palermo, 152 F.Supp. 825, 828, 829, fn. 11 (D.C. E.D. Pa. 1957), and the authorities cited therein.]

28 U.S.C. § 2007(a) provides that there shall be no imprisonment for debt in any state where imprisonment for debt has been abolished. California Constitution, Article 1, § 15, provides for the abolishment of imprisonment for debt with willfulness an exception. Taking into account

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Section 2007(a) and the cited California Constitution section, Patterson cannot be imprisoned by the United States District Court for the Northern District of California if he could not be so imprisoned under California law. All states in the Ninth Circuit have abolished imprisonment for debt. 4/

The California Unemployment Insurance Code after making provisions for the similar withholding by the employer of employees' contributions to the Unemployment Insurance Fund (holding the same in trust and protecting the funds from civil processes), provides in Section 2110 that any employer who "knowingly withholds the deductions required by this division from remuneration paid to

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4/ The states and their Constitutional Provisions with dates of ratification are: Alaska, Art. 1 § 17 (1959); Arizona, Art. 2, § 18 (1912); California, Art. 1, § 15 (1872); Hawaii, Art. 1, § 17 (1959), Idaho, Art. 1, § 15 (1890); Montana, Art. III, § 12 (1889); Nevada, Art. 1, § 14 (1864); Oregon, Art. 1, § 19 (1859); Washington, Art. 1, § 17 (1889).

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the workers, and willfully fails or is financially unable to pay such deductions * * * is guilty of a misdemeanor."

In People v. Neal C. Oester, Inc., 154 Cal.App.2d Supp. 888, 316 P.2d 784 (1957), a criminal complaint was filed against an employer under Section 2110. The complaint was dismissed by the trial court on the ground that Section 2110 was unconstitutional and in violation of California Constitution, Article 1, § 15, supra, in that the terms of the statute constituted imprisonment for debt.

The appellate court reversed the judgment of the trial court holding that the statute was constitutional in that the legislature intended that the word "willfully" qualifies the phrase "is financially unable." [316 P.2d 787.]

In reaching its conclusion, the California court discussed the general and specific aspects of Unemployment Insurance Code § 2110, parts of which discussion bear

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repeating.

The first question propounded by the court in Oester, was:

"Does the Constitutional Prohibition Against Imprisonment for Debt Apply in Criminal Cases?" [316 P.2d 785]:

"Yes."

"The people contend that this constitutional prohibition does not apply in criminal cases. With that contention we cannot agree. Although such a general statement appears in several cases (citations), these statements were expressly disproved in In re Trombley, 31 Cal.2d 801, 193 P.2d 734; In that case the court stated, 31 Cal. 2d at page 804, 193 P.2d at page 737 (after quoting Section 15 of Article 1 of the California Constitution): 'Although by its terms the prohibition is directed to imprisonment in civil actions, it has been held to apply in a criminal proceeding where it appears that the legislation under which the accused is charged constitutes an attempt to make the mere act of failing to pay a debt a crime. (Citations.)'" [Emphasis added.]

The second inquiry propounded by the court, was:

"Are These Workers' Contributions 'Taxes' and, if so, does the Prohibition Against Imprisonment for Debt Apply to Taxes?"

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"The answer to both of these Questions is Yes" [316 P.2d 784]:

"The People contend that these contributions are taxes, and that the constitutional prohibition against imprisonment for debt does not apply to taxes. As to the first contention, the weight of authority appears to be that these workers' contributions are taxes. * * *"

"In In re. Hacker-Byrne's Corp.,D.C., 96 F.Supp. 349, 351, the court states: 'We think that the monies which were withheld from the wages of the employees (under California Unemployment Insurance Code) are clearly taxes.'

"However, we cannot agree with the People's contention that this constitutional prohibition does not apply to taxes. The expression 'the law abolishing imprisonment for debt has no application for taxes' is to be found in Cooley on Taxation, Fourth Edition, Paragraphs 22 and 1349, and cases cited therein. However, most of these cases are license caes. There the penalty is for engaging in business without paying the tax, not simply for non-payment of a tax. There the defendant is not charged with failure to pay the license or tax; he is charged with carrying on a business without a license which he could secure by the paying of a license or tax."

"In all cases found in our research the element of wilfulness is found to be present before a criminal act is held to have been committed. The expression 'wilfully non-complying', 'wilfully neglecting', 'wilfully refusing', 'wilfully attempting' appears in all legislation in which criminal prosecution for failure to

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pay the tax is upheld. It appears to us that there must be criminal intent and wilfulness so as to bring the matter within the fraud exception to this constitution prohibition (see below) before imprisonment for non-payment of taxes may be had. Thus, we hold that the constitutional prohibition against imprisonment for debt does apply to taxes."

The court in Oester then analyzed the portion of Unemployment Insurance Code § 2110, which provides that the employer is guilty of a criminal offense if he knowingly withholds the deduction and "wilfully fails, or is financially unable to pay". [316 P.2d 786]

It held that the first alternative, i.e., "wilfully fails * * * to pay" is clearly valid [316 P.2d 786]:

> "An employer who knowingly withholds the deductions and then wilfully fails to pay them does an act against good morals and fair dealing and necessarily intentionally does an act which prejudices the rights of the employee. Such conduct amounts to 'a case of fraud' and is an exception to the constitutional prohibition against imprisonment for debt." [Emphasis is the court's.]

The second alternative, "or is financially unable", presented a problem

of interpretation of legislative intent to the court. It pointed out that there is no punctuation which would indicate any legislative intent that the word "wilfully" did not qualify "is financially unable"; that "wilfully" does qualify the phrase "is financially unable"; and, a showing of wilfullness is necessary for a conviction. Because of the interpretation that the legislature intended the statute to apply only to persons who were "wilfully financially unable", the court concluded that Unemployment Insurance Code § 2110 was constitutional.

In reaching this conclusion, however, it observed [316 P.2d 786]:

> "If this provision is interpreted to provide that simply being financially unable to pay is a criminal offense, it is clearly within the constitutional prohibition against imprisonment for debt. Simple insolvency would be a crime. The employment unit, and each member of it, would be guilty of a crime, if a dishonest employee or partner would embezzle the funds or if the money was stolen, lost, or destroyed, regardless of proof of fault. Such was clearly not the

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intent of the legislature. In order for there to exist a case of fraud so as to bring this or any other case within the fraud exception to this constitutional prohibition, there must exist wilfulness. The word 'wilfully' as used in criminal statutes implies a purpose or willingness to commit the act, and although it does not require an evil intent, it implies that the person knows what he is doing, intends to do what he is doing, and is a free agent (In re Trombley, supra)."

Without using the phrase "imprisonment for debt", this Court has found similar State activity as being in violation of the Equal Protection Clause of the Fourteenth Amendment. Such is applicable to the federal government through the Due Process Clause of the Fifth Amendment.

This Court has recognized the necessity of declaring State laws unconstitutional wherein an indigent could be incarcerated for more than the maximum term for inability to pay a fine or for mere inability to pay a fine imposed by the court. See Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 1930 (1970), and Tate v. Short, 401 U.S. 395, 91 S.Ct. 668 (1971).

The rationale of these cases differs not from imprisonment for debt since this Court through Chief Justice Burger emphasized in Williams, supra, at footnote 9:

> "We wish to make clear that nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs. [Citations]" [Emphasis added.]

By deleting the element of wilfulness from petitioner's offense, petitioner is equated with Williams and Tate.

The very fact that Williams and Tate were indigents removed any wilfulness and therefore any basis for their incarceration.

Congress itself removed wilfulness as a matter of law so far as petitioner is concerned.

Williams, Tate and petitioner are civil debtors of the sovereign.

None of them can be incarcerated since there is a lack of wilfulness in fact or in law.

In all other applicable tax statutes imposing civil and criminal liability upon a taxpayer for a failure to pay taxes, the element of wilfulness is proved if it can be shown that the taxpayer has the ability to pay. Removing the element of wilfulness allows indiscriminatory application of the statutes involved to any taxpayer regardless of his ability or inability to pay. Because of this, Sections 7215 and 7512 are unconstitutional as a denial of equal protection under the Fourteenth Amendment as embraced in the due process clause of the Fifth Amendment.

The State of California has long decided that in order to have a constitutionally proper criminal tax statute (other than a licensing or regulatory statute) there must be <u>wilfulness</u> before a person can be imprisoned for non-payment of money.

The dignity of the federal government can be no less than the dignity of the State of California.

Whether it be a denial of "equal protection", "due process", or because of derivative interpretation (or all of them), Congress by expressly eliminating "wilfulness" from 26 U.S.C. § 7512 enacted legislation which is invalid as requiring imprisonment for debt.

In its decision, the Court of Appeals below has wrongfully decided a question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated above, it is respectfully submitted that an allowance to issue a Writ of Certiorari be granted to review the decision of the court below.

Dated at San Francisco, California, on September 11, 1972.

Respectfully submitted,

EDWARD L. CRAGEN
HULBERT S. MURRAY
JOSEPH D. HOLMES

By Edward L. Cragen
EDWARD L. CRAGEN
Attorneys for Appellant
Norwood J. Patterson

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 72-1191
NORWOOD J. PATTERSON, Appellant.	)	
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 72-1565
NORWOOD J. PATTERSON, Appellant.	)	

Appeal from the United States District Court for the Northern District of California.

Before: BARNES and GOODWIN, Circuit Judges, and McGOVERN, District Judge.*

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* The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX "A"

GOODWIN, Judge:

Norwood J. Patterson was convicted by a jury on nine counts of violating Section 7512(b) of the Internal Revenue Code; i.e., of collecting taxes from the employees of Sierra Broadcasting, Inc., and failing to deposit them in trust within two banking days of the dates those sums were collected.

In a consolidated action, Patterson was also convicted of seven counts involving the collection of taxes from employees of Radio Station KBIF, Inc. He appeals both judgments.

Patterson and his wife owned all the stock of Sierra, and of Pattco, Inc., which owns KBIF. Patterson was president of both Sierra and KBIF.

The record reveals an extraordinary pattern of delinquencies during all or parts of the years 1963 through 1968, inclusive. Patterson was interviewed, warned, and repeatedly urged to comply with the

withholding requirements. He was under-capitalized, and apparently operated his various corporate enterprises by standing off creditors, including the government.

In due course, Patterson was formally served with IRS forms 2481 which notified Patterson, for each of his corporations, that he must comply with four requirements:

(1) Collect income tax withheld from employees and collect the employee Social Security contribution;

(2) Establish a trust account for the government in a bank;

(3) Deposit the taxes withheld and collected into that account; and

(4) Keep those funds in the bank until paid over to the government.

Patterson ignored these notices, and was prosecuted. He defended on the ground that he had been denied due process of law by being placed in a trust-account category without a hearing, and that the

law under which he was prosecuted was unconstitutional because, among other things, it provided for "imprisonment for debt."

On appeal, he reasserts his constitutional contentions, and argues also that the evidence was insufficient to convict.

The constitutional arguments are answered by United States v. Plotkin, 239 F. Supp. 129 (E.D. Wis. 1965). Due process does not demand hearings during every stage of administrative proceedings which lead to a confrontation with the government. It is sufficient if a hearing is had prior to the final order which deprives the person of his liberty. Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153 (1941).

The argument that he is being imprisoned for debt is specious. Patterson's misdemeanor was using as his own the tax money he was required by law to withhold from his workmen's wages and to pay over

to the government. Congress has adequate power to punish such conduct.

The argument that the evidence was insufficient to support conviction does not deserve discussion.

Affirmed.

FORM 2481
(Rev. Feb. 1960)

U.S. Treasury Department
Internal Revenue Service

NOTICE TO MAKE SPECIAL DEPOSITS OF TAXES

(Section 7512 of the Internal Revenue Code)

TO TAXPAYER:

Section 7501 of the Internal Revenue Code provides that whenever any person is required to withhold or collect any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so withheld or collected shall be held to be a special fund in trust for the United States. Our records disclose that you have not paid over to the United States, at the time and in the manner prescribed by law or regulations, internal revenue taxes required to be withheld or collected by you.

Therefore, pursuant to the provisions of section 7512 of the Internal Revenue Code, you are hereby notified that:

EFFECTIVE IMMEDIATELY, you are required to:

(1) Collect (at the time and in the manner provided by the law and the regulations) any of the following internal revenue taxes for which you are liable:

Income tax withheld from employees;

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Employee tax withheld under Federal Insurance Contributions Act; and

Excise taxes on admissions and club dues, leases of safe deposit boxes, communications and communication facilities, and transportation of persons.

(2) Establish a separate bank account in a bank (as defined in section 581 of the Internal Revenue Code) designated as "(Your Name), Trustee, Special Fund in Trust for U.S. under Sec. 7512, I.R.C."

(3) Deposit the taxes withheld or collected by you in such separate bank account not later than the end of the second banking day after the taxes are withheld or collected.

(4) Keep the taxes so deposited in such separate bank account until they are paid over to the Internal Revenue Service.

Failure to comply with any provision of section 7512(b) of the Internal Revenue Code shall constitute a misdemeanor, and, upon conviction thereof, you will be subject to a fine of not more than $5,000, or imprisonment for not more than one year, or both, together with the costs of prosecution. In addition, all penalties which are provided for failure to comply with any other provisions of law shall be applicable.

* * *

In addition to the requirements above, and pursuant to the provisions of section 6011 of the Internal Revenue Code and regulations issued thereunder, you are further

notified that:

EFFECTIVE FOR THE CALENDAR MONTH in which this notice is delivered, you are required to:

(1) File monthly returns on Form 720M and Form 941M for the taxes normally required to be reported quarterly. Your monthly returns must be filed not later than the 15th day of the month following the month covered by the return(s).

(2) Remit with each return the full amount of all taxes shown to be due. Payment in this manner makes it unnecessary for you to purchase depositary receipts for taxes withheld or collected after receipt of this notice.

If this notice is delivered to you during the second or third month of a calendar quarter, your return(s) for that month must include taxes due for the preceding month or months of the calendar quarter.

Issued under authority of section 7512(a), Internal Revenue Code, this 4th day of March, 1968.

/s/ Charles E. Kingman

ACTING District Director of
Internal Revenue

The applicable provisions of the Internal Revenue Code which are referred to in this notice are reproduced on the reverse of the original of this notice.

(See 7512 on reverse side)

APPENDIX "B"

ORDER OF UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, DENYING PETITION FOR REHEARING AND REJECTION OF REHEARING EN BANC.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 14 1972
CLERK

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	Nos. 72,1191 72,1565
NORWOOD J. PATTERSON, Appellant.	)	

Before: BARNES and GOODWIN, Circuit Judges, and McGOVERN, District Judge.*

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

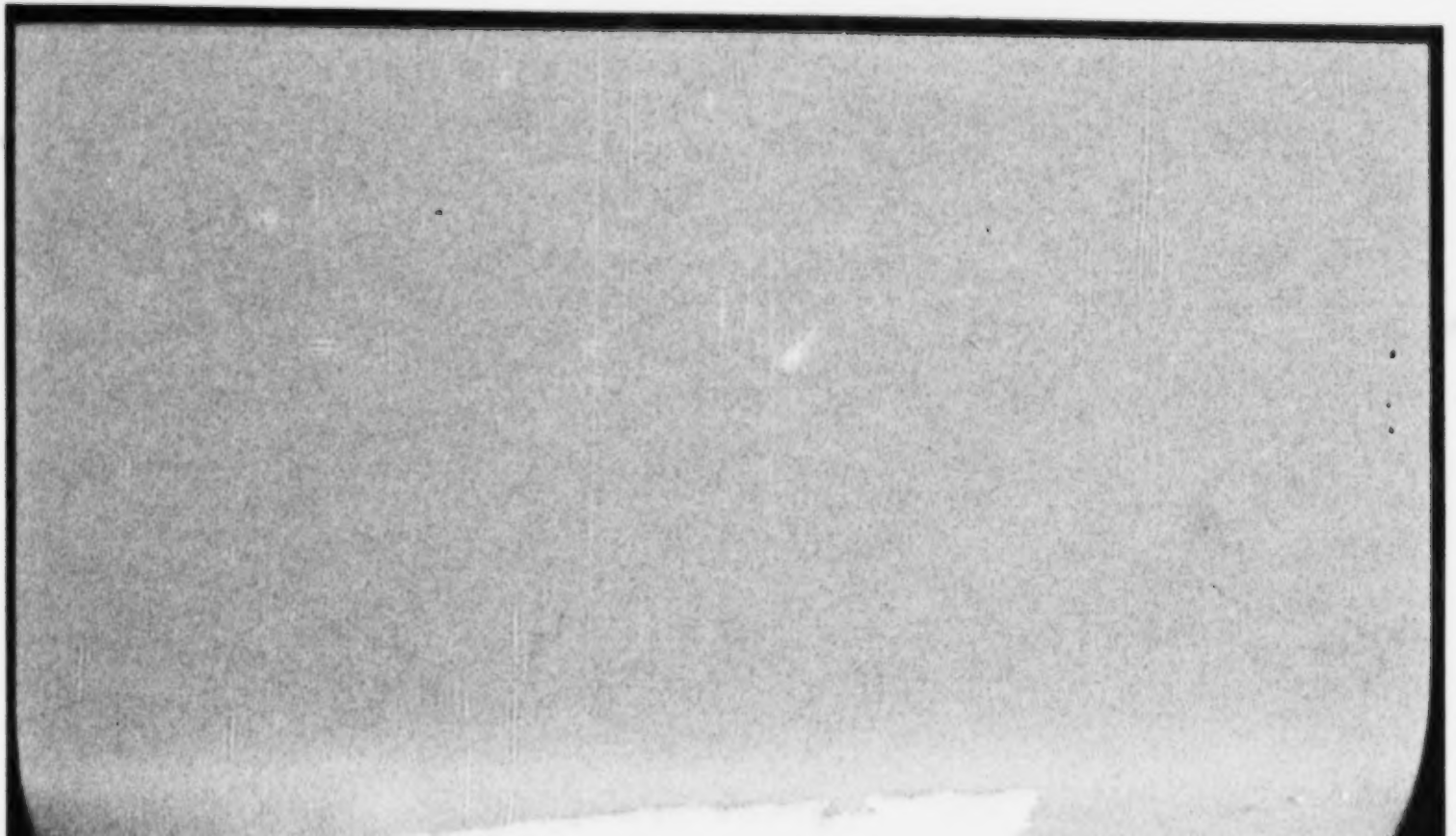
Fed. R. App. P. 35(b).

* The Honorable Wlater T. McGovern, United States District Judge for the Western District of Washington.

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

F I L E D
AUG 14 1972

CLERK



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-436

NORWOOD J. PATTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on sixteen counts of failing to make timely deposit of employee withholding taxes to a trust account, in violation of Section 7215 of the Internal Revenue Code of 1954, 26 U.S.C. 7215. He was sentenced to two consecutive five-month terms of imprisonment and fined $7,984. The court of appeals affirmed (Pet. App. A) on July 3, 1972, and rehearing was denied on August 14, 1972. The pe-

tition for a writ of certiorari was filed on September 14, 1972, and thus is out of time under Rule 22(2) of the Rules of this Court.

Beginning prior to 1964 and continuing through 1968, petitioner and his wife owned, directly or indirectly, all the outstanding common stock of Sierra Broadcasting, Inc. ("Sierra") and Radio Station KBIF, Inc. ("KBIF"), and petitioner was the president of both corporations.[1] By 1964, both Sierra and KBIF had become delinquent with respect to their obligation to file employee withholding tax returns and pay over the withheld taxes. Payment was made in full in July 1964, but both corporations again became delinquent in 1965. From the third quarter of 1965 through the end of 1967, only one quarterly return was filed on behalf of Sierra and that return itself was delinquent and was not accompanied by any payment; during the same period KBIF filed only one timely return (several delinquent returns for earlier periods were filed together in May 1967) and made only one payment. By the end of 1967, the cumulative unpaid withholding tax liabilities of the two corporations approached $90,000.[2]

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[1] Petitioner and his wife were also the principal shareholders of Golden Gate Broadcasting, Inc. ("Golden Gate") and Nordawn, Inc. ("Nordawn"), and petitioner was president of those corporations. All four corporations consistently failed to pay, or underpaid, the employee withholding taxes which they collected, but only Sierra and KBIF are involved in this case.

[2] In addition the unpaid withholding tax liabilities of Golden Gate and Nordawn approximated $20,000.

Persistent efforts by the Internal Revenue Service to persuade petitioner, who was responsible for the filing and payment delinquencies of both corporations, to comply with the employee withholding tax requirements were unsuccessful. As a consequence, on November 16, 1967, a Form L-54 was sent to each corporation by certified mail. These forms stated that continued failure to pay over employee withholding taxes might make it necessary to invoke the provisions of Section 7512 of the Internal Revenue Code of 1954; as the forms explained, that Section requires an employer, upon formal notice, to pay over current withholding taxes to a trust account within two business days of the payment of employee wages and provides, in conjunction with Section 7215, that failure to comply is punishable as a misdemeanor.

Petitioner, who admitted receiving the Forms L-54, nevertheless neither contacted the Internal Revenue Service to obtain a hearing or conference concerning the delinquencies and the possible invocation of Section 7512 nor permitted his corporations to fulfill their withholding tax responsibilities. Accordingly, on March 6, 1968, petitioner was personally served, in his capacity as president of the corporations, with two Forms 2481 invoking the provisions of Section 7512. Petitioner at that time indicated that he understood the requirements of that Section and would see that the necessary payments were made.

After service of the Forms 2481 neither corporation made any payments of withholding taxes until May 23, 1968. By that date the two corporations

had failed a total of nine times to make timely payment as required by Section 7512. Throughout June and July withholding tax payments were made promptly, but neither corporation made any of the required payments for August and September, even though there were ample funds available. During this period both corporations regularly paid employees and other creditors. Petitioner was personally responsible for the decisions not to pay the withholding taxes due.

2. Petitioner contends that the absence of any hearing prior to the issuance to him of Form 2481 constitutes a denial of due process which invalidates his subsequent conviction (Pet. 11-17) and that Section 7215 unconstitutionally prescribes imprisonment for debt (Pet. 17-31). These contentions are without merit and warrant no further review.

a. Sections 7215 and 7512 were enacted because of the ineffectiveness of the prior law in securing compliance with the employer's obligation to pay over to the government the money withheld from employees. S. Rep. No. 1182, 85th Cong., 2d Sess. (1958). Section 7512 permits the Internal Revenue Service to require prompt payment over of the current withholding taxes when an employer has failed to make timely payments in the past. The determination of when the imposition of such a requirement is necessary to the effectuation of the Service's responsibility for enforcement and collection is one which is properly left by the statute to the discretion of the Commissioner. Cf. *Phillips* v. *Commissioner*, 283 U.S. 589.

As this Court has often noted, "the requirements of due process frequently vary with the type of proceeding involved * * *." *Hannah* v. *Larche*, 363 U.S. 420, 440. Here there was no factual issue in dispute; it was conceded that petitioner was responsible for the filing of employee withholding tax forms and for the paying over of taxes for both Sierra and KBIF. The only question to be determined was whether special measures were necessary to secure future compliance. Petitioner suggests no reason why a formal hearing should be required for such a determination. Furthermore, petitioner had in fact met with revenue agents on several occasions prior to the issuance of the Form L-54 warning in order to discuss his withholding tax delinquencies. Due process does not demand a hearing at every stage of the administrative proceedings. *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 152-153. Moreover, having previously met with representatives of the Service, petitioner presumably was aware of the opportunity for further conferences. However, during the nearly four-month interval between his receipt of the Form L-54 warning and the issuance of the Form 2481 notices, petitioner did not request a conference to discuss the matter of his withholding tax responsibilities, even though he then knew that his continued failure to fulfill those responsibilities could lead to the invocation of Section 7512.

Section 7512 has been invoked only rarely,[3] and no formal hearing procedures have been established. But as the record in this case illustrates, the informal procedures employed afford ample opportunity for discussion with and presentation of arguments before officials of the Service. In the context of this case due process required no more.

b. As the court below properly observed (Pet. App. 4), petitioner's "argument that he is being imprisoned for debt is specious." Petitioner had collected the withholding taxes and was required to hold them in trust for the United States. 26 U.S.C. 7501(a). Because of petitioner's past failures to satisfy this duty, the Commissioner imposed a special duty to pay over future collections to a special trust account. Petitioner's course of action in continuing his refusal to pay over collected taxes and in using the moneys collected as his own constituted the misdemeanor for which he was convicted. Imprisonment for failure to pay over taxes is not imprisonment for debt. See *Carrollo* v. *United States*, 141 F. 2d 997 (C.A. 8). Cf. *United States ex rel. Griffin* v. *Martin*, 409 F. 2d 1300 (C.A. 2).[4]

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[3] The only other reported decision involving a prosecution under Section 7215 is *United States* v. *Plotkin*, 239 F. Supp. 129 (E.D. Wis.), rejecting the due process contention made by petitioner here.

[4] Although petitioner contends that Section 7215 is inconsistent with 28 U.S.C. 2007, there is no conflict: the latter statute applies only to imprisonment for debt on a writ of execution or other process issued in a *civil* proceeding. See *Freeman* v. *United States*, 217 U.S. 539, 544.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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